

June 1985

## The Power of Congress under the Property Clause: A Potential Check on the Effect of the Chadha Decision on Public Land Legislation

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### Recommended Citation

6 Pub. Land L. Rev. 65 (1985)

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# THE POWER OF CONGRESS UNDER THE PROPERTY CLAUSE: A POTENTIAL CHECK ON THE EFFECT OF THE CHADHA DECISION ON PUBLIC LAND LEGISLATION

Roger M. Sullivan, Jr.\*

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## I. INTRODUCTION

Public land law<sup>1</sup> has only recently emerged as a distinct area of law.<sup>2</sup> The scholars and practitioners who have undertaken the task of exploring and describing the major contours of this new legal domain have found that while public land law is a new field, it has roots that run deep through our nation's history and its legal tradition. Given the precedential nature of our legal system, it can be anticipated that as the courts are presented with public land law issues of first impression they will look to this past to inform their decisions. Likewise, it can be expected that in deciding such issues the courts will search the contemporary legal landscape in an attempt to integrate this new area of law into the overarching scheme of American jurisprudence.

Against such a backdrop, this article is concerned with examining a public land law issue of first impression. The particular issue involved is the constitutionality of section 204(e) of the Federal Land Management and Policy Act of 1976 (FLPMA), whereby a single committee of either house of Congress can withdraw public lands from mineral leasing by the Secretary of Interior.<sup>3</sup> This provision has been relied on in recent years to thwart several controversial attempts by the Secretary to lease public lands in Montana.<sup>4</sup> In two resulting lawsuits<sup>5</sup> the Secretary charged that these

1. As used in this article the term "public land law" refers to the statutes governing the public lands, as well as the judicial construction of these laws.

2. See Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 6 (1980) (footnote omitted):

Historically, it could be said that there was no defined body of "public land law." Separate attention was focused on the discrete bodies of law that had developed around the specific "economic" resources on the public lands—water, hardrock minerals, fuel minerals, forage, and timber. Today, public land law is a coalescing body of law, rather than a loosely connected series of laws dealing with separate resources. Today, for the first time, public land law is truly a field.

3. 43 U.S.C. § 1714(e) (1982) provides in relevant part:

When the Secretary determines, or when the Committee on Interior and Insular Affairs of either the House of Representatives or the Senate [Senate Committee on Energy and Natural Resources] notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal . . . .

4. On May 21, 1981 the House Committee on Interior and Insular Affairs adopted a resolution directing the Secretary of Interior to immediately withdraw from mineral leasing the public lands encompassed by the Bob Marshall Wilderness Complex in northwest Montana. On August 3, 1983 the same committee ordered the Secretary to withdraw from coal leasing the Fort Union tracts located in eastern Montana and western North Dakota.

actions amounted to legislative vetoes which were violative of the strictures for congressional action set forth in article I of the United States Constitution, as recently construed by the United States Supreme Court in *Immigration and Naturalization Service v. Chadha*.<sup>6</sup> While in both cases the federal district courts upheld the committee action on technical grounds, the underlying constitutional issue remains unresolved. In its simplest form, that issue is whether Congress possesses a power under the property clause of article IV to perform an act, the legislative veto, which has otherwise been declared violative of the requirements of article I.

Given the profound cleavage that continues to exist between the executive branch and the House of Representatives on resource issues, it is probable that this controversy will yet be resolved by the courts.<sup>7</sup> This article explores whether there is a viable argument to support the exemption of the legislative veto provision contained in section 204(e) of FLPMA from the strictures for legislation set forth in *Chadha*.

## II. BACKGROUND

### A. FLPMA and the Assertion of Congressional Power Over the Public Lands

The United States owns 740 million acres of land or roughly one-third of the nation's land mass.<sup>8</sup> Of this amount, almost 700 million acres<sup>9</sup> are statutorily regulated by Congress under the property clause of the United States Constitution.<sup>10</sup> Considered vague in origin and perplexing in its location within the Constitution,<sup>11</sup> the property clause has evolved through

5. See *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982 (D. Mont. 1982) (involving the Bob Marshall Wilderness Complex in western Montana); and *National Wildlife Federation v. Watt*, 571 F. Supp. 1145 (D. D.C. 1983) (involving the Fort Union coal tracts in eastern Montana and western North Dakota).

6. 103 S. Ct. 2764 (1983), *aff'g* *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980). Since *Pacific Legal Foundation* was decided before the Supreme Court handed down its decision in *Chadha*, in *Pacific Legal Foundation* the Secretary relied on the Ninth Circuit opinion in *Chadha*.

7. By returning President Reagan to the White House, while retaining a Democratic majority in the House of Representatives, the American electorate has set the stage for renewed controversy in this area.

8. UNITED STATES PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 19 (1970) [hereinafter cited as PLLRC].

9. The remaining 40 million acres are regulated by Congress under the enclave clause, U.S. CONST. art. I, § 8, cl. 17. See *infra*, note 97. See also D. COGGINS AND C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 146 (1981).

10. U.S. CONST. art. IV, § 3, cl. 2: "Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States . . . ."

11. The other enumerated powers of Congress are located in Article I of the Constitution.

a series of United States Supreme Court opinions into a plenary source of congressional power over these lands.<sup>12</sup> The watershed opinion in this process was issued in 1976 by the Supreme Court in *Kleppe v. New Mexico*,<sup>13</sup> which both definitively marked the emergence of this clause as a preemptive legislative power over the public domain,<sup>14</sup> as well as indicated that the process of defining the bounds of Congress' power under the property clause was not yet complete:

[T]he Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands. And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations."<sup>15</sup>

Pursuant to this power, Congress in the last decade thoroughly revamped the statutory framework governing the public lands.<sup>16</sup> The Federal Land Policy and Management Act of 1976<sup>17</sup> stands as the cornerstone to the contemporary congressional scheme for regulating the use of these lands. In FLPMA, Congress fundamentally restructured both the policy of the federal government toward the public lands and the system of delegated authority under which the executive branch implemented public land policy. Rejecting the long-standing policy favoring disposal of these lands,<sup>18</sup> Congress enunciated a new policy of retention<sup>19</sup> for multiple use and sustained-yield.<sup>20</sup> And in contrast to the former statutory framework which was characterized by broad delegations of authority,<sup>21</sup> FLPMA contained specific guidelines governing executive

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Regarding historical materials, one respected commentator has concluded that the "debates at the Constitutional Convention and other early interpretations are not especially illuminating." Wilkinson, *supra* note 2, at 10. *But cf. infra* notes 89-112 and accompanying text.

12. *See, e.g.*, *United States v. San Francisco*, 310 U.S. 16 (1940); *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917); *Light v. United States*, 220 U.S. 523 (1911).

13. 426 U.S. 529 (1976).

14. *Id.* at 543.

15. *Id.* at 539.

16. *See* Resources Planning Act of 1974 and National Forest Management Act of 1976, both 16 U.S.C. §§ 1601-13 (1982); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84 (1982).

17. 43 U.S.C. §§ 1701-84 (1982).

18. *See generally* COGGINS AND WILKINSON, *supra* note 9, at 43-119.

19. 43 U.S.C. § 1701(a)(4) (1982).

20. 43 U.S.C. § 1732 (1982).

21. *See, e.g.*, the Withdrawal [Pickett] Act of 1910, which provided that:

The President may at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purpose to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (1910) (repealed by Pub. L. 94-579, § 704(a), 90 Stat.

withdrawals of public lands from private use.<sup>22</sup>

The withdrawal provisions of FLPMA are of particular significance, since the executive branch had traditionally relied on both an implied delegation of withdrawal power from Congress<sup>23</sup> as well as the claim of an inherent authority of the President to make withdrawals.<sup>24</sup> In section 704(a), however, Congress expressly revoked the implied authority of the executive to make withdrawals.<sup>25</sup> And in section 102(a) Congress unequivocally rejected the notion of an inherent executive power to make withdrawals, stating that it is the policy of the United States that "the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action."<sup>26</sup>

Moreover, to insure executive compliance with the statutory guidelines for withdrawals, Congress retained in section 204(c) of FLPMA a legislative veto power over Executive branch withdrawals in excess of 5,000 acres,<sup>27</sup> and in section 204(e) Congress retained the power to order the Secretary of Interior to withdraw lands when the relevant committee of either the House or Senate determined that an emergency threatened such lands.<sup>28</sup>

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2792, 43 U.S.C. § 1774(a) (1982).

22. See 43 U.S.C. § 1714 (1982). FLPMA defined withdrawals as follows:

The term "withdrawal" means withholding an area of Federal land from settlement, sale, location or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program . . . .

43 U.S.C. § 1702(d) (1982).

23. In *United States v. Midwest Oil Co.*, 236 U.S. 459, 475 (1915), the Supreme Court affirmed the executive withdrawals of public lands containing petroleum deposits on the basis of an implied delegation of authority flowing from acquiescence in a long established executive practice:

These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public but did not interfere with any vested right of the citizen.

24. In 1941 Attorney General Jackson issued an opinion affirming the inherent power of the executive to make permanent withdrawals of public lands. See 40 Op. Att'y Gen. 73 (1941). This opinion was subsequently relied on by the Secretary of Interior in making large-scale withdrawals without congressional authorization. See Wheatley, *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311, 316-17 (1979).

25. Pub. L. No. 94-579, 90 Stat. 2743, 2792 (1976) provides in relevant part: "Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress and the following statutes and parts of statutes are repealed . . ." This section went on to repeal twenty-nine withdrawal statutes passed between 1888 and 1952, including the Pickett Act of 1910.

26. 43 U.S.C. § 1701(a)(4) (1982).

27. 43 U.S.C. § 1714(c) (1982).

28. 43 U.S.C. § 1714(e) (1982).

Although President Ford acquiesced in signing FLPMA into law,<sup>29</sup> the executive branch has consistently resisted as unconstitutional such reservations of congressional power as contained in section 204.<sup>30</sup> Indeed, the constitutionality of these control mechanisms has been cast into doubt by the recent Supreme Court decision in *Chadha*. The *Chadha* Court held that the legislative veto exercised by one house of congress pursuant to a provision of the Immigration and Nationality Act (INA)<sup>31</sup> was a legislative act,<sup>32</sup> thus violating the requirements in article I of the United States Constitution that legislation be enacted by both houses of Congress<sup>33</sup> and then presented to the President for signature or veto.<sup>34</sup> Before examining the implications of this decision on section 204(e) of FLPMA, the legislative veto mechanism and the *Chadha* decision are examined in more detail.

### B. *The Legislative Veto*

The legislative veto first appeared in 1932 in legislation authorizing President Hoover to reorganize the executive agencies by executive order subject to congressional disapproval prior to the effective date of the order.<sup>35</sup> From this origin the legislative veto has grown to become a formidable component of modern legislation.<sup>36</sup> The laws containing a legislative veto provision have come to address a variety of national problems, ranging from foreign relations to the management of the public lands.<sup>37</sup> The geometric proportions of this trend have been revealed by a survey of its use:

Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940-49, nineteen statutes; between 1950-59 thirty-four statutes; and from 1960-69, forty-nine. From the year

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29. See Department of Interior comments to Hon. James A. Haley, Chairman, Committee on Interior and Insular Affairs (November 25, 1975). H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. at 47, reprinted in 1976 U.S. Code Cong. & Ad. News 6221.

30. See Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. LEGIS. 735, 737-38 n.7 (1979) (listing presidential statements in opposition to the legislative veto).

31. 8 U.S.C. §§ 1101-1503 (1982).

32. *Chadha*, 103 S. Ct. at 2787.

33. U.S. CONST. art. I, § 1.

34. U.S. CONST. art. I, § 7, cl. 2, 3.

35. Act of June 30, 1932, ch. 314 § 407, 47 Stat. 414. For more on early uses of the legislative veto see Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 258-59 (1982).

36. See Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 324 (1977).

37. See Appendix I attached by Justice White to his dissenting opinion in *Chadha* where the legislative veto provisions contained in sections 203 and 204 of FLPMA are cited. 103 S. Ct. at 2816.

1970 through 1975, at least one hundred sixty-three such provisions were included in eighty-nine laws.<sup>38</sup>

This trend had a decided effect on the Supreme Court's scrutiny of the legislative veto in *Chadha*: "[O]ur inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies . . . ."<sup>39</sup>

Several twentieth century political developments have been credited with creating the impetus for Congress to develop this mechanism. One significant development is the increased power of the presidency as an institution.<sup>40</sup> Beginning with Woodrow Wilson, taking an exponential leap with Franklin Roosevelt and continuing in successive administrations, this process has focused enormous powers in the executive branch which were formerly diffused among the several branches of government.<sup>41</sup> The increasing complexity of the issues facing our government has fueled this process, as Congress has found it necessary to delegate extensive decision-making authority to the executive branch in order to implement broadly conceived legislative policies.<sup>42</sup>

In the public land law area during the last decade, however, Congress has enacted legislation, including FLPMA, which is characterized by a different theme: "[The] central thrust is not to delegate broad authority to land management agencies but rather to limit administrative discretion by requiring public participation and establishing prohibited acts."<sup>43</sup> Despite the differences in the scope of the delegated authority, in both instances Congress has attempted to retain increased control over the administrative agencies' exercise of this authority by retaining a veto power over agency decisions.<sup>44</sup> In *Chadha*, however, the Supreme Court stood this scheme on its head by declaring that the legislative veto provision in the INA violated the basic constitutional principle of separation of powers.<sup>45</sup>

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38. See Abourezk, *supra* note 36, at 324 (quoted in *Chadha*, 103 S. Ct. at 2781).

39. *Chadha*, 103 S. Ct. at 2781.

40. See Miller and Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 375-77 (1977), for a list of factors including the increased power of the President.

41. That the founding fathers were themselves aware of this possibility is hauntingly illustrated by the following quote from Thomas Jefferson: "The tyranny of legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at some remote period." Jefferson Works, Vol. II, 358. Quoted in Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 317 (1936).

42. See generally, Abourezk, *supra* note 36.

43. Wilkinson, *supra* note 2, at 6.

44. For a list of public land laws containing legislative vetoes see Backiel and Baldwin, *Who Controls the Federal Lands After Chadha?*, in *Cong. Research Serv. Rev.*, The Legislative Veto After *INS v. Chadha* (special ed. 1983).

45. 103 S. Ct. at 2788.



### C. *The Chadha Decision*

#### 1. *Facts*

Jagdish Rai Chadha is an East Indian who came to the United States on a nonimmigrant student visa in 1966.<sup>46</sup> He overstayed his visa and was ordered by the Immigration and Nationality Service (INS) to show cause why he should not be deported under the provisions of the INA.<sup>47</sup> In response to this order Chadha applied for suspension of his deportation under section 244(a) of the INA.<sup>48</sup> After a hearing, the immigration judge found that Chadha met the standards of the INA which allowed for a suspension of deportation, including the criterion that deportation would cause extreme hardship.<sup>49</sup>

The House of Representatives, however, acting under a legislative veto provision contained in section 244(c) of the INA, overruled this administrative determination.<sup>50</sup> Consequently, the INS ordered Chadha deported. Chadha filed a petition for review of the deportation order in the Ninth Circuit, arguing that the legislative veto used to overrule the agency determination was unconstitutional. The INS joined Chadha in his argument, forcing the Senate and the House to file briefs in support of the veto provision. The Ninth Circuit held that the legislative veto exercised by the House to effectuate Chadha's deportation was unconstitutional and it ordered the INS to cease its deportation proceedings against him.<sup>51</sup> The INS then applied for and received a writ of certiorari from the Supreme Court to review the case on its merits.<sup>52</sup>

#### 2. *The Supreme Court's Reasoning*

Chief Justice Burger wrote the opinion for a six-justice majority of the Court.<sup>53</sup> After disposing of a "political question doctrine" defense raised

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46. *Id.* at 2770.

47. 8 U.S.C. §§ 1101-1503 (1982).

48. 8 U.S.C. § 1254(a) (1982).

49. *Chadha*, 103 S. Ct. at 2770.

50. *Id.* at 2771.

51. *Id.* at 2772. In contrast, the Ninth Circuit issued a narrowly reasoned opinion in which the court of appeals reserved judgment as to the constitutionality of similar provisions in other statutes: "Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device." *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 433 (9th Cir. 1980).

52. *Chadha*, 103 S.Ct. at 2771.

53. Justice Powell concurred, but in contrast to the majority he believed that Congress acted judicially rather than legislatively when it determined that Chadha did not comply with the statutory criteria of the INA. *Chadha*, 103 S. Ct. at 2791. Justice Rehnquist dissented on the basis that the legislative veto provision was inseverable from the provision of the INA delegating authority allowing the INS to suspend the deportation of Chadha in the first place. *Id.* at 2816. Justice White alone

by Congress,<sup>54</sup> the Court addressed the issue of the constitutionality of the legislative veto on its merits. Although the Court acknowledged the prevalence of this legislative mechanism and admitted that it might in fact be a useful political invention, the Court nevertheless stated that such considerations would not exempt it from the requirements set forth in the Constitution.<sup>55</sup>

Noting that the Constitution explicitly defines the respective functions of the Congress and the Executive in the legislative process, the Court set out verbatim the bicameral and presentment clauses of Article I.<sup>56</sup> The Court noted that these clauses were integral parts of the constitutional design for the separation of powers, and relying on the 1976 Supreme Court case of *Buckley v. Valeo*,<sup>57</sup> the Court served notice that it would use what amounted to a strict interpretivist approach when construing the implications of these clauses in preserving this constitutional design.<sup>58</sup>

Relying on this approach, the *Chadha* Court surmised that the requirements of the presentment clauses were intended by the framers to

dissented on the merits of the constitutional issue, reasoning that if "Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself." *Id.* at 2802.

54. Congress argued that the naturalization clause, U.S. CONST. art. I, § 8, cl. 4, and the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18, combined to give Congress unreviewable authority over the regulation of aliens, rendering *Chadha's* appeal nonjusticiable. After reviewing the traditional criteria set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Court concluded that the constitutionality of the legislative veto was justiciable. *Chadha*, 103 S. Ct. at 2778-80. For further discussion of the relevance of the political question doctrine to the resolution of the controversy concerning § 204(e) of FLPMA, see *infra* notes 230-35 and accompanying text.

55. *Chadha*, 103 S. Ct. at 2780-81.

56. *Id.* at 2781 (emphasis added by the Court):

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate *and* a House of Representatives. Art. I, § 1 (emphasis added).

Every Bill which shall have passed the House of Representatives *and* the Senate, *shall*, before it becomes a Law, be presented to the President of the United States; Art. I, § 7, ch. 2 (emphasis added).

*Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be* presented to the President of the United States; and before the Same shall take Effect, *shall be* approved by him, or being disapproved by him, *shall be* repassed by two thirds of the Senate and House of Representatives . . . Art. I, § 7, cl. 3 (emphasis added).

57. 424 U.S. 1, 124 (1976). In *Valeo* the Supreme Court declared that a provision of the Federal Elections Campaign Act, 2 U.S.C. §§ 431-56 (1970, Supp. IV), which allowed Congress to appoint members to the Federal Election Commission violated constitutional provisions for the separation of powers. *Id.* at 136. In reaching this conclusion the *Valeo* Court relied extensively on the *FEDERALIST PAPERS* (H. Lodge ed.) (1888), as well as M. Farrand, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1911) to construe the framers' intent vis-a-vis the separation of powers outlined in the Constitution.

58. *Chadha*, 103 S. Ct. at 2781. Interpretivism has been defined as a system of constitutional analysis wherein judges should confine themselves to enforcing norms that are stated or clearly implied in either the written Constitution or its legislative history. See J. Ely, *DEMOCRACY AND DISTRUST*, 1-42 (1980).

establish a check upon the legislative body which would both enable the President to defend himself from encroachments by Congress, as well as decrease the possibility of bad laws coming into effect through the indiscretion of Congress.<sup>59</sup> The Court likewise determined that the bicameral clause was intended to discourage Congress from passing ill-conceived laws, while at the same time diffusing the power which the framers considered to be the most susceptible to abuse.<sup>60</sup> On the basis of this analysis of the framers' intent in drafting the presentment and bicameral clauses, the *Chadha* Court concluded that "[i]t emerges clearly that the prescription for legislative action in article I, §§ 1, 7 represents the framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered procedure."<sup>61</sup>

Having enunciated the constitutional requirements demanded of legislation, the Court had only to determine if the legislative veto was a legislative act. The Court stated that such a determination was not dependent on the form of an action, but rather on its character and effect.<sup>62</sup> On this basis the Court concluded that the exercise of the legislative veto against *Chadha* was essentially a legislative act because it "had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and *Chadha*, all outside the legislative branch."<sup>63</sup> Since this legislative act did not meet the bicameral and presentment requirements prescribed by article I, the Court declared it unconstitutional.<sup>64</sup>

### 3. Critique

Virtually all of the legislative veto provisions, contained in nearly 200 statutes, have "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside of the legislative branch."<sup>65</sup> By adopting this test for determining what constitutes legislation, the Supreme Court in *Chadha* rendered a decision with broad implications. Since legislative veto provisions by their very nature do not comply with the "single, finely wrought and exhaustively considered procedure" required of legislation,

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59. *Chadha*, 103 S. Ct. at 2782. In reaching this conclusion the Court relied on THE FEDERALIST PAPERS, No. 73 at 457-58, and 2 M. FARRAND, *supra* note 57, at 301-02.

60. *Chadha*, 103 S. Ct. at 2783, relying on M. FARRAND, *supra* note 57, at 254, and THE FEDERALIST PAPERS, No. 22 at 135, No. 51 at 324.

61. 103 S. Ct. at 2784.

62. *Id.*

63. *Id.*

64. *Id.* at 2788.

65. Justice White was quick to point out this implication in his dissent in *Chadha*, 103 S. Ct. at 2792. See also Abourzek, *supra* note 36, at 323, 324.

namely bicameral passage and presentment, all are susceptible to constitutional challenge.<sup>66</sup>

Despite the contentions of the *Chadha* Court, it is not at all clear that such a result is firmly premised on the intent of the framers. The framers themselves rejected an explicit approach to the separation of powers by discarding a proposal that the three departments "shall be distinct, and independent of each other except in specified cases."<sup>67</sup> Instead, the framers opted for a separation of the coordinate branches that was implicit in the final document.

Further, although the writings of Madison were heavily relied upon by the *Chadha* Court in support of its strict construction of the separation of powers doctrine, historical records show that Madison himself held a much more circumspect view. Madison stated that the doctrine flowed from the recognition that "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."<sup>68</sup> He further explained that this did not mean "that these departments ought to have no *partial agency* in, or *control* over, the acts of each other."<sup>69</sup>

Consistent with this conception of the Constitution, which contemplated an overlapping of the powers exercised by the coordinate branches of government, the dominant focus of analysis by the Supreme Court in separation of power disputes has usually been on the extent to which a particular action by one branch of government undermined the independence and integrity of another branch.<sup>70</sup> This approach established cooperation between the coordinate branches as the norm, while judicial

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66. The Supreme Court confirmed the far-reaching implications of the *Chadha* decision when two weeks later it affirmed the judgments rendered by the District of Columbia Circuit in *Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983), and *Consumers Union of U.S., Inc. v. Federal Trade Comm'n*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983). Although there were significant factual differences between these cases and *Chadha*, the court of appeals had employed reasoning very similar to that used by the Supreme Court in *Chadha*. In *Consumer Energy Comm'n* the court had declared unconstitutional a two House veto, whereas in *Chadha* a one House veto was at issue; and both *Consumer Energy Comm'n* and *Consumer Union* involved legislative vetoes of agency rules as opposed to the agency adjudicatory order at issue in *Chadha*. By summarily affirming these judgments the Supreme Court confirmed the breadth of the *Chadha* decision.

67. 2 M. FARRAND, *supra* note 57, at 138. Likewise, attempts to include an explicit separation of powers clause in the Bill of Rights was rejected. See Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 130 (1971). Both cited in Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 720-23 (1984). The Banks article more thoroughly develops the argument based on the framers' intent set forth below.

68. THE FEDERALIST NO. 47, at 302 (J. Madison) (H. Lodge ed. 1888).

69. *Id.* at 301-02. In making these statements, Madison was relying on the theory of Montesquieu to rebut charges that the proposed Constitution was deficient by virtue of not having incorporated a strict separation of powers doctrine.

70. See, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 227-31 (1978).

resolution of such conflicts based on a simplistic textual approach stand out as the exception.<sup>71</sup> Although earlier Burger Court opinions foreshadowed the approach taken in *Chadha*,<sup>72</sup> the *Chadha* rationale is noteworthy for its total abandonment of the Court's earlier functional analysis.

As one commentator has noted, the *Chadha* Court's rationale took the form of a simple syllogism, structured in the following manner:

major premise: when Congress engages in "lawmaking" it may do so only in accordance with the procedural requirements of article I;

minor premise: exercise of the legislative veto was "lawmaking" that did not comply with article I;

conclusion: exercise of the legislative veto was unconstitutional.<sup>73</sup>

The minor premise is nothing more than a tautology circling back to the major premise.<sup>74</sup> Given the framers' intent discussed above, it is questionable that the legislative veto is lawmaking. Nevertheless, given the Court's rationale, the decision stands as an imminent threat to all legislative veto provisions.

The task at hand, however, is not to sound the "death knoll" for all such statutes.<sup>75</sup> Rather, this article is concerned with determining whether there is a viable argument that can be advanced in favor of exempting a particular legislative veto provision contained in legislation passed by Congress pursuant to the property clause of article IV from the article I rigors set forth in *Chadha*. While this issue has yet to face appellate review, two federal district courts have addressed the issue.

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71. See, e.g., *Myers v. United States*, 272 U.S. 52 (1926) (where the Court relied on the appointments clause, U.S. CONST. art. II, § 2, to find an unlimited removal power vested in the executive as an incident of the power of appointment); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (where the Court declared that an executive order made without congressional authorization was an act of lawmaking, thus violating the separation doctrine).

72. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974) (finding no executive privilege to shield the presidential documents at issue from congressional investigators although acknowledging such a privilege could protect other presidential material); *Buckley v. Veleo*, 424 U.S. 1 (1976) (relying on the appointments clause to declare unconstitutional a congressional attempt to appoint some members of the Federal Election Commission, although acknowledging that there was no "hermetic sealing off" of the three branches).

73. Goldsmith, *INS v. Chadha and the Nondelegation Doctrine: A Speculation*, 35 SYRACUSE L. REV. 749, 752 (1984).

74. See Banks, *supra* note 67, at 725: "The Court's textual argument is weak and tautological—the majority concluded that the legislative veto is article I 'legislation,' and thus subject to article I strictures, by simply declaring that the veto is 'essentially legislative in character and effect.'"

75. Justice White has already done this in his dissent in *Chadha*, 103 S. Ct. at 2792.

D. *Initial Cases Construing Section 204(e) of FLPMA*

In *Pacific Legal Foundation v. Watt* (PLF),<sup>76</sup> the plaintiffs were oil and gas lease applicants who brought suit against the Secretary of Interior after the Secretary reluctantly complied with a withdrawal resolution adopted by the House Committee on Interior and Insular Affairs. Acting under the authority of section 204(e) of FLPMA, the committee directed the Secretary to withdraw the public lands within the Bob Marshall Wilderness complex in northwestern Montana from the operation of mineral leasing laws until January 1, 1984.<sup>77</sup>

While the *PLF* case arose prior to the Supreme Court's ruling in *Chadha*, the *PLF* court distinguished the Ninth Circuit's decision in *Chadha* on the basis of a strained interpretation of section 204(e). Proceeding on the erroneous premise that "FLPMA continued the traditional law"<sup>78</sup> respecting withdrawals, the court construed section 204(e) as delegating to the Secretary the power to determine the scope and duration of any withdrawal requested by Congress.<sup>79</sup> On this basis the court determined that the mechanism was sufficiently similar to traditional congressional committee powers to pass constitutional muster.<sup>80</sup>

Even assuming arguendo that the *PLF* court's statutory construction was otherwise correct, however, the court's reasoning would still not withstand the test for legislation established by the Supreme Court in *Chadha*. Clearly, the committee action in this instance affected the legal rights and duties of individuals outside of Congress, and therefore, according to *Chadha*, it was a legislative act requiring adherence to the constitutional requirements of bicameralism and presentment. Although in dictum the *PLF* court summarily declared that Congress' power under the article IV property clause was subject to the article I requirements for legislation,<sup>81</sup> the issue of whether the property clause provided grounds to

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76. 529 F.Supp.982 (D. Mont. 1982); *clarified*, 539 F.Supp. 1194 (D. Mont. 1982). For a more thorough analysis of this case, see Zafferano, *Legal and Policy Implications of Pacific Legal Foundation v. James Watt*, 3 PUB. LAND L. REV. 51 (1982).

77. *Pacific Legal Foundation*, 529 F.Supp. at 984-85. The Bob Marshall Wilderness Complex includes the Bob Marshall, Great Bear and Scapegoat Wilderness Areas all of which were created pursuant to the National Wilderness Act of 1964, 16 U.S.C. §§ 1131-36 (1976). The Wilderness Act provided that mineral exploration and leasing would be allowed to continue in wilderness areas until midnight December 31, 1983. 16 U.S.C. § 1133(d)(3) (1976). Hence, the committee action effectively precluded any further exploration or leasing activity in those areas. *See Pacific Legal Foundation*, 529 F. Supp. at 985.

78. *Pacific Legal Foundation*, 529 F. Supp. at 999. As previously discussed *at supra* notes 8-34 and accompanying text, precisely the opposite was the case. In section 704(a) of FLPMA, 43 U.S.C. § 1764(a) (1982), Congress explicitly revoked any implied executive authority to make withdrawals as well as repealed most former statutory delegations of authority to the executive to make withdrawals.

79. *Pacific Legal Foundation*, 529 F. Supp. at 1000.

80. *Id.* at 1000, 1005.

81. *Id.* at 1003.

an exception to *Chadha* remained open.

In *National Wildlife Federation v. Watt* (NWF)<sup>82</sup> the legality of a withdrawal resolution of the House Committee on Interior and Insular Affairs made pursuant to section 204(e) of FLPMA was again at issue. In *NWF* the plaintiffs sought to enjoin the Secretary of Interior from issuing coal leases in the Fort Union tracts in eastern Montana and western North Dakota after the Secretary announced his plans to proceed with the leasing process despite the committee resolution.<sup>83</sup>

The *NWF* court criticized the *PLF* court's construction of section 204(e), and declared that it was indeed the kind of legislative activity declared unconstitutional in *Chadha*—provided that the *Chadha* rationale applied to the article IV property clause.<sup>84</sup> Unconvinced that it did, the court held that until withdrawn through a formal notice and comment process, the Secretary of Interior was bound under the Administrative Procedure Act to abide by his own regulation which incorporated the section 204(e) provision for congressionally ordered withdrawals.<sup>85</sup> The irony of this hypertechnical resolution of an issue of profound constitutional significance did not escape the *NWF* court, which noted that:

Notice and comment would have afforded scholars and interested parties, including possibly counsel for the House of Representatives, the courtesy and the opportunity to do some of the research and analysis requisite to a reasoned decision about an original constitutional question and test the opinions of defendant's advisors.<sup>86</sup>

To this end, the next section of this article examines the history and development of Congress' powers under the property clause, including an examination of the appropriate standard of judicial review to be used in determining the constitutionality of legislation passed under the aegis of the property clause. This article will then analyze the affect of *Chadha* on section 204(e) of FLPMA.

### III. THE NATURE OF CONGRESSIONAL POWER UNDER THE PROPERTY CLAUSE

As noted earlier, the *Chadha* Court emphasized the framers' intent in

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82. 571 F. Supp. 1145 (D. D.C. 1983). On the basis of the rationale employed in this case to enjoin the Secretary from issuing the coal leases, the court later granted the plaintiffs' motion for summary judgment. See *National Wildlife Federation v. Clark*, 577 F. Supp. 825 (D. D.C. 1984). For a further analysis of these cases and the issue with which they dealt, see Comment, *Chadha and the Public Lands: Is FLPMA Affected?*, 5 PUB. LAND L. REV. 55 (1984).

83. *National Wildlife Federation*, 571 F. Supp. at 1147, 1149.

84. *Id.* at 1155.

85. *Id.* at 1157.

86. *Id.*

construing the provisions of the Constitution at issue.<sup>87</sup> Given this approach to constitutional analysis, research into the limits of the legislative power of Congress under the property clause must address the framers' intent in drafting and ratifying the clause. This inquiry cannot stop there, however, as the framers did not contemplate the complex issue at hand in drafting the property clause. Thus, in resolving this issue, direction must be sought from previous Supreme Court cases construing the congressional power under the property clause. While these cases arose in a number of different contexts, they nonetheless illuminate the scope of congressional power under the property clause.<sup>88</sup>

### A. *The Framers' Intent*

The property clause was the result of several important historical developments. With the Royal Proclamation of 1763<sup>89</sup> the English Crown forbid settlement on any land west of the Alleghenies. This attempt by England to limit settlement of the western territory<sup>90</sup> played a significant role in bringing about the American Revolution of 1776.<sup>91</sup>

After the thirteen colonies declared their independence from England, however, the western lands continued to be a source of tension between the new states. The six smaller states, which held none of the western lands, contended that those lands should be held by the central government for the benefit of all of the states.<sup>92</sup> These smaller states feared

87. See *supra* notes 35-45 and accompanying text. The *National Wildlife Federation* court also noted this approach to constitutional analysis by the Burger Court, citing as further examples *Marsh v. Chambers*, 103 S. Ct. 3330, 3332-34 (1983) (Chaplains for legislatures); and *Solem v. Helm*, 103 S. Ct. 3001, 3006-07 (1983) (proportionality of punishment). *National Wildlife Federation*, 571 F. Supp. at 1156.

88. These cases indicate an evolution of congressional power which some commentators have likened to the judicial development of a broad congressional power under the commerce clause. See Wilkinson, *supra* note 2, at 14-15.

89. The Royal Proclamation of October 7, 1763, reserved "for the use of the . . . Indians . . . all the Lands and territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and Northwest . . ." i.e., most of the Mississippi valley and its tributaries from the east. See B. KNOLLENBERG, *GROWTH OF THE AMERICAN REVOLUTION 1766-1775* (1975) at 380 n.2.

90. While the stated purpose of the Proclamation was to reserve lands for use by the Indians, historians have posited that an unstated purpose of the Proclamation was to discourage settlement in the west as a way of preserving the colonial market for British exports. See B. KNOLLENBERG, *ORIGIN OF THE AMERICAN REVOLUTION: 1759-1766* (1960) at 104.

91. B. KNOLLENBERG, *supra* note 89, at 198, lists the Proclamation as one of ten major irritants in the Colonies prior to 1765. See also L. GIPSON, *THE COMING OF THE REVOLUTION* 139-40 (2d ed. 1962), cited in Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 695 (1981). In the Declaration of Independence the list of colonial grievances against the English Crown included the following: "He has endeavored to prevent the population of these states; for that purpose, obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands."

92. T. DONALDSON, *THE PUBLIC DOMAIN* 60 (1884). The six smaller states were Rhode Island,



being dominated in the new union by the seven larger states.<sup>93</sup> On the other hand the larger states, which had received title to vast tracts of territory west of the Appalachian Mountains either by grant from the Crown of England or by treaty with the Indian tribes, opposed release of these lands to the central government.<sup>94</sup>

While this conflict proved a major stumbling block to the ratification of the Articles of Confederation, it was ultimately resolved by the larger states releasing their claims to the western territory.<sup>95</sup> These cessions in turn required Congress to exercise powers of government over them, which in turn precipitated a new problem, because under the Articles of Confederation the central government was neither empowered to own any land within the former colonies, nor given authority to form such land into new states.<sup>96</sup>

These deficiencies were among the numerous problems which were intended to be resolved by the Constitution.<sup>97</sup> The pressing nature of these

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Maryland, Pennsylvania, New Hampshire, New Jersey and Delaware. These states argued that since this territory had been secured from Great Britain in the Treaty of 1783 by the blood of the whole people, this territory should be held by the central government for the benefit of the nation. *Id.*

93. See 3 WAY & GIDEON, JOURNALS OF THE AMERICAN CONGRESS, 1774-1788(1823) at 281-83 cited in Brodie, *supra* note 91, at 695.

94. T. DONALDSON, *supra* note 92, at 60. The seven larger states included New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina and Georgia. The controversy over the western lands did not simply pit the smaller states against the larger states. The larger states disputed among themselves rival claims to this land based on ill-defined and conflicting grants made by different sovereigns of Great Britain. *Id.*

95. The Articles of Confederation were adopted by delegates from the thirteen original states on November 15, 1777. Ratification by the states was not completed, however, until March 1, 1781, by the action of Maryland, one of the smaller states. T. DONALDSON, *supra* note 92, at 57. On that same day the first of the larger states, New York, pursuant to a resolution of Congress, surrendered its claims to western lands to the Confederation. This lead was followed by Virginia, Massachusetts, Connecticut, and South Carolina, who likewise ceded western lands to the Confederation. A cession of western lands by North Carolina and Georgia was not affected until after the ratification of the Constitution. *Id.* at 60, 65.

96. In fact the Articles of Confederation, art. IX, stated that "no State shall be deprived of territory for the benefit of the United States."

97. Another major problem which grew out of the inability of the central government to own any land under the Articles of Confederation was the inability of Congress to own and control land on which the national capitol was located. Congress also lacked the authority to own and control land for the erection of military installations. To remedy this situation, the framers included among the enumerated powers of Congress contained in Article I of the Constitution a provision that has come to be known as the enclave clause:

[Congress shall have power] to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

U.S. CONST. art. I, § 8, cl. 17.

This provision has raised little contemporary controversy over the constitutionality of legislation

deficiencies was brought into sharper focus by Congress' passage of the Northwest Territory Ordinance on July 13, 1787, in the course of the Constitutional Convention.<sup>98</sup> Despite the lack of a clear power providing for such actions,<sup>99</sup> Congress provided in the Northwest Territory Ordinance both for the governance of lands in territory outside of the Confederated States and for the division of this territory into new states.

The response of the framers to these deficiencies sheds important light on both the nature and limits of the power of Congress over the public lands. On August 18, 1787, James Madison, a delegate to the Constitutional Convention from Virginia, made a motion for vesting additional powers in Congress "[t]o dispose of the unappropriated lands of the United States" and "[t]o institute temporary governments for new states arising therein."<sup>100</sup> These proposals were referred to the Committee of Detail, which on August 22 reported out a proposal vesting in Congress a power of considerably wider scope:

[T]o provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the governments of individual States, in matters which respect only their internal police, or for which their individual authorities may be competent.<sup>101</sup>

Consideration of the Committee's proposal was postponed; then on August 30 the Convention discussed a proposal for the admission of new states, which ultimately became article IV, section 3, clause 1.<sup>102</sup> In the

affecting these lands. This probably results both from the obvious necessity of such a power as well as from the Court's rejection of a narrow construction of the clause. *See* Wilkinson, *supra* note 2, at 10-11. The leading case on this point is *Collins v. Yosemite Park and Curry Co.*, 304 U.S. 518 (1938), where the Court stated:

The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the courts will recognize and respect.

*Id.* at 528. *See also* *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885); *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929).

98. The Northwest Territory Ordinance, 2 F. THORPE, *FEDERAL AND STATE CONSTITUTIONS* 957 (1909), was published in full for the first time in Philadelphia, site of the Constitutional Convention, in the *Pennsylvania Herald* on July 25, 1787. *See* C. WARREN, *THE MAKING OF THE CONSTITUTION* (1937) at 595 n.2.

99. *See* C. WARREN, *supra* note 98, at 591, 595; T. DONALDSON, *supra* note 92, at 153.

100. 2 M. FARRAND, *supra* note 57, at 321. *See also* 2 J. MADISON, *THE CONSTITUTIONAL CONVENTION OF 1787*, at 189 (1908 ed.).

101. 2 M. FARRAND, *supra* note 57, at 367; 2 J. MADISON, *supra* note 100, at 226.

102. U.S. CONST. art IV, § 3, cl 1, provides:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the

context of that discussion, the delegates turned to a consideration of the competing claims of the United States and certain individual states to portions of the western territory. In an apparent attempt to address both the earlier concerns for the provisions of an enumerated power of Congress over this territory, as well as to forge a compromise over the competing claims to these lands, Gouverneur Morris, a delegate from Pennsylvania, proposed and the Convention adopted article IV, section 3, clause 2,<sup>103</sup> now commonly referred to as the property clause.<sup>104</sup>

While the property clause thus preserved the claims of both the United States and the existing states to portions of the western territory, it also granted an enormous power to Congress over "the Territory or other Property belonging to the United States." The implications of this power were enormous, for while the central government owned little land in the original thirteen states it did claim ownership of vast tracts of the western territory.<sup>105</sup> Although several commentators have rejected the claim of broad implications and vigorously argued for an interpretation of the property clause under which Congress retained only a narrow power over such lands once they passed from territory to new states,<sup>106</sup> the records of the Constitutional Convention would seem to support a broader power.

Jealousy over the potentially dominating power of the new states that would eventually be carved from the western territory was voiced at various times during the Convention,<sup>107</sup> and this concern ultimately had a direct impact on the new states clause as well as a significant, though more subtle, impact on the property clause. The Committee of Detail had proposed a version of the new states clause which provided that "the new States shall be admitted on the same terms with the original States."<sup>108</sup> Morris,

Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

103. U.S. CONST. art IV, § 3, cl. 2, provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution contained, shall be so construed as to prejudice any claims either of the United States or of any particular State.

104. For further discussion of the dynamics involved in the adoption of the property clause see C. WARREN, *supra* note 98, at 600. See also Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 291 n.24 (1976).

105. Engdahl, *supra* note 104, at 292.

106. See generally Engdahl, *supra* note 104; and Brodie, *supra* note 91.

107. See C. WARREN, *supra* note 98, at 592-98. Throughout the Convention Morris was one of the chief protagonists of the idea of admitting future states into the Union with less powers of representation than the original states. Although Morris' attempt to permanently fix the representation of the states so that the original states could never be outvoted by the new states failed, his ideas nevertheless had a profound impact on both the new states clause and property clause. See *infra*, text accompanying notes 108-112.

108. Report of the Committee of Detail, August 6, 1787. See 2 M. FARRAND, *supra* note 57, at 188.

however, moved to strike this provision, stating that he did not "wish to throw the power into their hands."<sup>109</sup> Madison countered that the new western states "neither would nor ought to submit to a Union which degraded them from an equal rank with the other States."<sup>110</sup> Morris' motion, however, carried by a decisive vote.<sup>111</sup>

Thus, a solid argument can indeed be made that the framers did not intend to have the new western states enter into the Union on a completely equal footing with the original states.<sup>112</sup> Seen in this light, the considerable power over *all* federal property seemingly granted to Congress in the property clause, drafted by Morris soon after his victory over Madison in the vote over the new states clause, makes sense. The most plausible construction of the clause is that the framers intended to grant Congress the power to "make all needful Rules" for the western lands both in its contemporaneous form as "Territory" and subsequently as "other Property" should a new state be formed from such territory. As discussed below, however, early opinions by the Supreme Court were not in accord with this interpretation.

### B. *Early Supreme Court Developments*

In its early years the Supreme Court was faced with the formidable task of delineating specific bounds to the powers which the Constitution had granted in general terms to the coordinate branches of government.<sup>113</sup> In this process of delineation, the Court drew a sharp distinction between a broadly construed power of Congress over the public lands in the territory of the United States, and a more limited power over the same land once the territory it was located in achieved statehood. While this distinction has been relied on by recent advocates of a narrow federal power over the public lands,<sup>114</sup> the importance of this distinction has largely receded in the

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109. 2 M. FARRAND, *supra* note 57, at 454.

110. *Id.*

111. *Id.* Only Maryland and Virginia voted to admit new states on equal terms with the original states.

112. Given the framers' intent, the Supreme Court's enunciation of the equal footing doctrine in *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), and subsequent cases is open to criticism. Without examining the framers' intent, the Court in *Pollard* held that "The new states have the same rights, sovereignty and jurisdiction" over navigable streambeds as were retained by the original states. *Id.* at 230. More in keeping with the framers' intent is an equal footing doctrine premised on equality of political authority as opposed to jurisdiction over or ownership of public lands in the new state. *See United States v. Texas*, 339 U.S. 707, 716 (1950). *See also* notes 130-145 and accompanying text, *infra*.

113. *See generally*, C. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835* (1960 ed.); *see also* J. SCHMIDHAUSER, *THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS 1789-1957* (1973).

114. *See generally*, Engdall, *supra* note 105; Brodie, *supra* note 92.

face of a more expansive reading of the property clause.<sup>115</sup> Nevertheless, as will be seen, these early developments remain important to an understanding of the nature of the contemporary power of Congress under the property clause.

### 1. *The Power of Congress Over the Territory*

In two early cases, *Sere & Lalarde v. Pitot*<sup>116</sup> and *American Insurance Co. v. Canter*,<sup>117</sup> Chief Justice Marshall authored opinions upholding in broad terms the power of Congress to govern the territory of the United States.<sup>118</sup> In *Sere & Lalarde* the Court declared:

[W]e find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively.<sup>119</sup>

In line with the power of Congress outlined in *Sere & Lalarde*, the Court in *American Insurance Co.* upheld Congress' creation of an article I, as opposed to an article III, territorial court.<sup>120</sup> In explaining both the nature of these courts as well as the basis to the power of Congress to create such courts, the *American Insurance Co.* Court stated:

These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of

115. See, e.g., *Kleppe*, 426 U.S. at 543, where the Court found that under the property clause Congress had a broad power to enact legislation respecting the public lands in the states, and that such legislation preempted conflicting state legislation under the supremacy clause, U.S. CONST. art. VI, cl. 2.

116. 10 U.S. (6 Cranch) 332 (1810).

117. 26 U.S. (1 Peters) 511 (1828).

118. In both cases the property clause was relied on as an alternative source of congressional power over the territory of the United States. The Court also noted in each case that such a power was an incident of sovereignty over these lands. See *Sere and Lalarde*, 10 U.S. (6 Cranch) at 336, and *American Insurance Co.*, 26 U.S. (1 Pet.) at 542.

119. 10 U.S. (6 Cranch) at 337.

120. 26 U.S. (1 Pet.) at 544-45. The *American Insurance Co.* Court upheld the validity of an admiralty judgment rendered by a Florida territorial court which was comprised of untenured judges. The Court held that the article IV property clause encompassed the power to establish courts which did not have to meet the tenure and salary requirements of federal judges as specified in article III, and that such courts could nevertheless exercise the subject matter jurisdiction described in article III. *Id.*

those general powers which that body possesses over the territories of the United States.<sup>121</sup>

Subsequent opinions uniformly confirmed the plenary nature of Congress' power over the territory,<sup>122</sup> subject only to minimal limitations.<sup>123</sup> Although once the source of much controversy,<sup>124</sup> the passage of most of the territory into statehood has resulted in little controversy in this area in recent years. The extraordinary dimensions of this power were, however, underscored by the recent Supreme Court opinion in *Northern Pipeline Co. v. Marathon Pipeline Co.*,<sup>125</sup> where the Court held that the bankruptcy court system, created by Congress under the Bankruptcy Reform Act of 1970,<sup>126</sup> violated Article III of the Constitution.<sup>127</sup> The plurality opinion of *Northern Pipeline Co.* stated that the separation of powers doctrine, of which article III was an integral part, allowed Congress to create legislative courts in only

three narrow situations, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers.<sup>128</sup>

Significantly, the *Northern Pipeline Co.* Court cited *American Insurance Co.* and recognized the property clause as one source of such an "exceptional" power, which allowed Congress to create non-article III territorial courts.<sup>129</sup> Thus, *Northern Pipeline Co.* stands as an important

121. *Id.* at 545.

122. *See, e.g.*, *United States v. Gratiot*, 39 U.S. 526 (1840); *Cross v. Harrison*, 57 U.S. 164 (1854); *Hamilton v. Dillin*, 88 U.S. 73 (1875); *Boyd v. Thayer*, 143 U.S. 135 (1892); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dorr v. United States*, 195 U.S. 138 (1904).

123. In *Dorr v. United States*, 195 U.S. at 142, the Court stated that while the citizens of a territory lacked full constitutional rights, the power of Congress over the territories was nevertheless "not without limitations." The Court went on to state that the limitation, in any given case depended on "whether the territory had been incorporated into the United States as a body politic." *Id.* at 143.

124. *See, e.g.*, *The Acquisition and Government of Territory*, in 3 *Selected Essays on Constitutional Law* 436-526 (1938).

125. 458 U.S. 50 (1982).

126. 28 U.S.C. §§ 1471-82 (1976, Supp. IV).

127. *Northern Pipeline Co.*, 458 U.S. at 86-87, n. 39. U.S. CONST. art. III, § 1 provides in relevant part: "The judges both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." For a discussion of the constitutional basis to the legislative courts and the article III courts see Hughes, *The Constitutionality of the Bankruptcy Court and the Ongoing Search for a Principled Distinction Between Article I and Article III Courts: A Re-Evaluation After Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 35 SYRACUSE L. REV. 829 (1984).

128. 458 U.S. at 64.

129. *Id.* at 64-65. Along similar lines, the *Northern Pipeline Co.* plurality opinion recognized the validity of the legislative court system of the District of Columbia under the enclave clause, U.S.

contemporary Supreme Court precedent acknowledging the "historically and constitutionally" unique power of Congress under the property clause in the separation of powers context.

## 2. *The Power of Congress Over the Public Lands in the States*

Unlike the territories, the states created out of the public domain received the residuary of the unenumerated powers of the Constitution.<sup>130</sup> Moreover, the enclave clause provided an enumerated power of Congress over public lands in the states held for specific purposes.<sup>131</sup> As such, the Supreme Court in its early decisions conceived of the nature of the power of Congress over public lands in the states in a fundamentally different manner than the way in which it conceived of the power of Congress over public lands in the territories.

On the basis of this distinction, the Court developed in the term immediately following Chief Justice Marshall's death, two formidable limitations on the power of Congress over the public lands in new states created out of former territorial lands. Though interrelated, these constraints were premised on two separate doctrinal developments. One limitation was premised on the already existent doctrine of enumerated powers.<sup>132</sup> The second limitation, more fully developed in subsequent opinions, came to be known as the equal footing doctrine.<sup>133</sup> Since these doctrines have historically provided the most significant limitations on the exercise of power by Congress under the property clause, a brief examination of them is in order.

In the early case of *New Orleans v. United States*,<sup>134</sup> the Supreme

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CONST. art. I, § 8, cl. 17. *Id.* The two other "narrow situations" in which the Court approved legislative courts were military courts, and legislative courts which adjudicate cases involving "public rights" created through acts of Congress. *Id.* at 66-69.

130. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

131. See, *supra* note 97.

132. Chief Justice Marshall set forth this doctrine, and pointed to its inherently unsettled nature, as follows:

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist.

*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

133. According to the equal footing doctrine, the Constitution requires that all states be admitted into the Union on a status equal to that of the original thirteen states. While this is a seemingly simple proposition, the Supreme Court has labored long and hard to determine what factors must be considered when rendering such a judgment. See generally Hanna, *Equal Footing In the Admission of States*, 3 BAYLOR L. REV. 519 (1951).

134. 35 U.S. (10 Pet.) 662 (1836).

Court was faced with the question of whether the State of Louisiana or the United States owned title to and had jurisdiction over certain river front lots in the City of New Orleans, which lots had formerly been held by the Spanish crown before the Louisiana Territory was ceded by treaty to the United States. In holding that the state had both title to and jurisdiction over these lands, the *New Orleans* Court relied on a two-pronged rationale. First, the Court used the doctrine of enumerated powers to construe the power of Congress over public land in the states in very narrow terms:

Special provision is made in the constitution, for the cession of jurisdiction from the states over places where the federal government shall establish forts, or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.<sup>135</sup>

Then, the *New Orleans* Court used the terms of the act admitting Louisiana into statehood to further preclude the claim of congressional jurisdiction over the public lands at issue:

The State of Louisiana was admitted into the union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States.<sup>136</sup>

This narrow construction of the property clause, along with the concern for the equality of the states, served as a precursor to the equal footing doctrine, as developed by the Court in *Pollard v. Hagan*.<sup>137</sup> In *Pollard*, the Court was faced with a dispute between plaintiffs who claimed title to Alabama tidelands under a patent from the United States and defendants who claimed title under a prior Spanish land grant.<sup>138</sup> As in *New Orleans*, the *Pollard* Court relied on the doctrine of enumerated powers to find a narrow congressional power to own and govern public land in a state, as opposed to a broad power over the public lands in a territory.<sup>139</sup> Then, in apparent reliance on the property clause, the tenth amendment, and the new states clause, the *Pollard* Court set forth the elements of what has come to be known as the equal footing doctrine:

First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this

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135. *Id.* at 737.

136. *Id.*

137. 44 U.S. (3 How.) 212 (1845).

138. *Id.* at 219-20.

139. *Id.* at 223-25.



subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.<sup>140</sup>

Subsequent cases relied on this doctrine to firmly establish the right of the respective states to title in the navigable river beds and tidelands within their borders.<sup>141</sup> A century after *Pollard*, however, a series of Supreme Court opinions<sup>142</sup> established the equal footing doctrine as a two-edged sword which was used to sharply limit the claims of coastal states to anything but immediately adjacent tidelands.<sup>143</sup> Moreover, these more recent opinions established the equal footing doctrine as premised on a guarantee of political equality, and not economic equality, of which ownership of the public lands is seen as an incident.<sup>144</sup> While this narrow interpretation of the equal footing doctrine is a far cry from the doctrine as set forth in *Pollard*, it is arguably more in keeping with what we know of the framers' intent.<sup>145</sup>

### C. *The Emergence Of A Preemptive Congressional Power Over The Public Lands*

In light of *New Orleans* and *Pollard*, the doctrine of enumerated

140. *Pollard*, 44 U.S. (3 How.) at 229-30.

141. *Mumford v. Wardell*, 73 U.S. (6 Wall.) 423 (1867); *Wever v. Harbor Comm'rs*, 85 U.S. (18 Wall.) 37 (1873); *Knight v. United Land Ass'n*, 142 U.S. 161 (1891); *Shively v. Bowlby*, 152 U.S. 1 (1894); *United States v. Mission Rock Co.*, 189 U.S. 391 (1903); *United States v. State of Oregon*, 295 U.S. 1 (1935).

142. *United States v. California*, 332 U.S. 19 (1946); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Maine*, 420 U.S. 515 (1975).

143. In *United States v. California*, 332 U.S. 19, 32 (1947), the Court noted that none of the original thirteen states owned the three mile belt which stretched seaward from the low tide mark. On this basis, the *California* Court refused to extend the *Pollard* doctrine to include state ownership of this land, ruling instead that the federal government held paramount rights to this land. *Id.* at 38. Three years later, in *United States v. Texas*, 339 U.S. 707, 718 (1950), the Court affirmed its earlier ruling in *California*.

144. See *United States v. Texas*, 339 U.S. at 716 (citations omitted):

The "equal footing" clause has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never been equality among the states in that sense. Some states when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.

145. As earlier indicated, the framers voted for equality of political representation of the new states under article I of the Constitution, but firmly rejected the proposal under Article IV that all new states be admitted to the Union on a completely equal basis with the original states. See *supra* notes 89-112 and accompanying text.

powers and the equal footing doctrine loomed as major limits on the exercise of congressional power over the public lands in the states. The Supreme Court, however, contemporaneously developed other major strands of property clause doctrine which acted to preserve a large measure of congressional control over those lands, even before the Supreme Court sharply limited the scope of the equal footing doctrine in the middle of the twentieth century.

Although not denominated as such in early opinions, these strands were marked on the one hand by the Court's broad application of the preemption doctrine,<sup>146</sup> and on the other hand by the Court's refusal to apply the nondelegation doctrine.<sup>147</sup> Each strand continues to exert an important influence on the contemporary power of Congress under the property clause, and as such an understanding of them is important to our study.

### 1. *Early Preemption Cases*

In *Wilcox v. Jackson*<sup>148</sup> the Supreme Court was faced with resolving competing claims of title to a military fort in the State of Illinois. A settler claimed title to this land under a preemption statute passed by Congress in 1834,<sup>149</sup> and on this basis argued that Illinois law was now controlling.<sup>150</sup> In holding for the federal government the Court rejected the settler's claim, and instead found a broad preemptive power to be vested in Congress through the property clause,<sup>151</sup> under the shadow of which state property law must operate:

We hold the true principle to be this, that whenever the question in any Court, state or federal, is, whether a title to land which had

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146. When Congress exercises a constitutional power, the supremacy clause, U.S. CONST. art. VI, cl. 2, mandates that federal law preempts a state law when there is a conflict between the two laws. See J. NOWAK, R. ROTUNDA, J. YOUNG, *CONSTITUTIONAL LAW* 292 (2d ed. 1983). Chief Justice Marshall succinctly set forth the preemption doctrine as follows: "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action." *McCulloch*, 17 U.S. (4 Wheat.) at 405.

147. Article I, § I of the Constitution assigns all legislative power to Congress. Under the nondelegation doctrine, "[T]he Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). See also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

148. 38 U.S. (13 Pet.) 498 (1839).

149. *Id.* at 510. Preemption in the public land law context was the preferential right of a settler to buy his claim at a modest price without competitive bidding. See COGGINS AND WILKINSON, *supra* note 9, at 67.

150. *Wilcox*, 38 U.S. (13 Pet.) at 516.

151. The federal government claimed that it held title to the land at issue by virtue of a presidential withdrawal made pursuant to the authorizing legislation, and by a saving clause in the preemption statute. *Id.* at 511-12.

once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.<sup>152</sup>

In the term immediately following the *Wilcox* decision, the Supreme Court faced another challenge to the exercise of congressional power over the public lands in the State of Illinois. In *United States v. Gratiot*<sup>153</sup> the defendants attempted to avoid contractual obligations under a license issued by the President for mining lead on the public lands. The defendants raised two issues, arguing first that the executive branch lacked the authority to enter into such a contract,<sup>154</sup> and second that such use of the public lands encroached upon states rights.<sup>155</sup> The Court soundly rejected both arguments. Finding that under the property clause the power of Congress over these lands is "without limitation," the Court upheld the President's authority under a broad statutory delegation of power.<sup>156</sup> In disposing of the state rights claim the Court simply concluded: "She surely cannot claim a right to the public lands within her limits."<sup>157</sup>

The *Gratiot* Court's finding that Congress' power over the public lands in a state was "without limitation" was significant, since the Court had formerly found such a broad power under the property clause to apply only to the territories.<sup>158</sup> Subsequent opinions concerned with the issue of congressional power under the property clause have continued to apply this standard to both the territories<sup>159</sup> and the states.<sup>160</sup>

Thus, contemporaneous with the development of the limiting strands of property clause doctrine that the Court set forth in *New Orleans* and

152. *Id.* at 517.

153. 39 U.S. (14 Pet.) 526 (1840).

154. *Id.* at 537.

155. *Id.* at 538.

156. *Id.* at 537.

157. *Id.* at 538.

158. *See Sere & Laralde v. Pitot*, 10 U.S. (6 Cranch) 332, 337 (1810); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 537 (1828).

159. *See* cases cited in footnote 122, *supra*.

160. *See Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *United States v. San Francisco*, 310 U.S. 16, 29 (1940); *United States v. California*, 332 U.S. 19, 27 (1947); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952); *Ala. v. Tex.*, 347 U.S. 272, 273 (1954); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958); *Kleppe v. N.M.*, 426 U.S. 529, 539 (1976). While the *Kleppe* Court observed that the Supreme Court had repeatedly found that under the property clause Congress' power over the public lands was "without limitations," the Court also cryptically noted that "the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved . . . ." *Kleppe*, 426 U.S. at 539.

*Pollard*, there began to emerge, in *Wilcox* and *Gratiot*, another strand of property clause doctrine that sustained a broad congressional power over the public lands in the states. As subsequent case law confirmed, *Wilcox* and *Gratiot* were precursor's of the contemporary property clause doctrine, which has eclipsed the influence of *New Orleans* and *Pollard*.

Although the principle of a broad congressional power over the public lands came to dominate property clause doctrine, it was a gradual process resisted at every step by those who continued to argue for a narrow congressional power. The Court's responses to these individual controversies have gradually added definition to the general principles set forth in *Wilcox* and *Gratiot*.

## 2. *The Dual Nature of Congress' Preemptive Power Over the Public Lands*

One important component of the preemptive federal power over the public lands is its dual nature, whereby Congress acts as both a proprietor and a legislature for such lands. The dual nature of Congress' power was first clearly delineated in *Camfield v. United States*,<sup>161</sup> where the Supreme Court was called upon to resolve a challenge to the constitutionality of the Enclosures Act of 1885.<sup>162</sup> In *Camfield* a private landowner had devised a clever fencing scheme that enclosed a large amount of federal land with fences that were located solely on private land, and on this basis the defendant claimed to be beyond federal jurisdiction.<sup>163</sup> The Supreme Court rejected this contention on two counts. First, the *Camfield* Court found that under the property clause Congress held a proprietorial power over the public lands which would have sustained a trespass action against the defendant, even in the absence of legislation prohibiting such an act.<sup>164</sup> Second, the Court found that Congress was vested with a broad preemptive

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161. 167 U.S. 518 (1897).

162. 43 U.S.C. §§ 1061-66 (1982). The Act was the result of numerous fencing schemes enclosing enormous tracts of federal lands that were interspersed with sections granted to the railroads. Another provision of the Act prohibited individuals from preventing other persons the right of entry onto and passage over the public lands. Relying on *Camfield*, the Supreme Court upheld this provision in *McKelvey v. United States*, 260 U.S. 353, 359 (1922). See Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381, 389-90 (1981).

163. *Camfield*, 167 U.S. at 522.

164. The *Camfield* Court explained:

[T]he Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property . . . It needs no argument to show that the building of fences upon public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of courts of justice.

*Id.* at 524.

legislative power over the public lands, which provided a sound constitutional basis to the legislation at issue.<sup>165</sup>

Subsequent opinions have confirmed the dual nature of Congress' power over the public lands under the property clause.<sup>166</sup> A significant implication that arises from the exercise of this power is that when Congress makes "needful rules and regulations" respecting the public lands, it is not necessarily acting pursuant to its legislative power as set forth in article I of the Constitution. Rather, under the property clause, Congress has the additional latitude of a proprietor who is vested with a considerable amount of discretion in the manner in which it chooses to manage the lands entrusted to it.

On this basis, the Supreme Court has acknowledged the distinctive nature of legislation affecting the public lands, and upheld delegations of congressional power which otherwise might not have been sustained.<sup>167</sup>

### 3. *The Nondelegation Doctrine and The Distinctive Character of Legislation Concerning the Public Lands*

In *Butte City Water Co. v. Baker*,<sup>168</sup> the Supreme Court upheld both a broad statutory delegation of authority to local miners to make regulations governing the location of mining claims, and an implied delegation of authority which allowed the states to legislate in this area.<sup>169</sup> In rejecting the appellant's argument that this was an unconstitutional delegation of legislative power,<sup>170</sup> the Court noted that the proprietorial power of Congress under the property clause gave legislation respecting the public lands a distinctive character:

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165. The *Camfield* Court found:

The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case . . . . A different rule would place the public domain of the United States completely at the mercy of state legislation.

*Id.* at 525-26.

166. See *Light v. United States*, 220 U.S. 523, 536 (1911); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *Sinclair v. United States*, 279 U.S. 263, 297 (1929); *Ala. v. Tex.*, 347 U.S. 272, 273 (1954); *Kleppe v. N.M.*, 426 U.S. 529, 540 (1976).

167. More traditional delegations of power to federal administrative agencies have, not surprisingly, likewise been upheld. See *United States v. Grimaud*, 220 U.S. 506 (1911), where the Court upheld regulations promulgated by the Secretary of Agriculture pursuant to a delegation of power contained in the Forest Service Organic Act of 1897, 16 U.S.C. §§ 473-81 (1982). The rule relied on by the *Grimaud* Court, *id.* at 520, was set forth by the Supreme Court in *Field v. Clark*, 143 U.S. 649, 694 (1892) as follows:

The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government.

168. 196 U.S. 119 (1905).

169. *Id.* at 127.

170. *Id.* at 125.

While the disposition of these lands is provided for by Congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not a legislative character in the highest sense of the term, and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands.<sup>171</sup>

The broad latitude accorded congressional use of its proprietorial power under the property clause was again relied on by the Supreme Court in *United States v. Midwest Oil Co.*<sup>172</sup> to find and uphold an implied delegation of authority to the President, which empowered him to withdraw from private location large tracts of oil rich public land.<sup>173</sup>

In light of *Butte City Water Co.* and *Midwest Oil Co.*, strong precedents exist in support of the proposition that, in exercising its proprietorial power over the public lands, Congress is not strictly bound by the traditional constraints of the nondelegation doctrine. The implications of this proposition are significant in light of the apparent revival of the nondelegation doctrine by the Supreme Court in *Chadha*. In *Chadha* the linchpin to the decision was provided by the Court's determination that the legislative veto provision of the INA delegated to a single committee of Congress the power to perform an essentially legislative act in violation of the article I requirements of presentment and bicameralism.<sup>174</sup>

#### 4. *Kleppe v. New Mexico: The Consolidation of Preemptive Congressional Control of the Public Lands*

Any doubts about the preemptive nature of congressional control over the public lands were firmly resolved by the Supreme Court in *Kleppe v. New Mexico*.<sup>175</sup> In *Kleppe* the State of New Mexico challenged the constitutionality of the Wild Free-roaming Horses and Burros Act,<sup>176</sup>

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171. *Id.* at 126.

172. 236 U.S. 459 (1915).

173. *Id.* at 474: "[W]hile no such express authority has been granted, there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions."

174. 103 S. Ct. at 2780-88. The last time that the Court invoked the nondelegation doctrine to invalidate a federal statute was in 1936, in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). Uniformly seen as dormant or dead, commentators were surprised to see the doctrine play a pivotal role in the *Chadha* decision. See Goldsmith, *INS v. Chadha and the Nondelegation Doctrine*, 35 SYRACUSE L. REV. 749, 750-51 (1984).

175. 426 U.S. 529 (1976).

176. 16 U.S.C. §§ 1331-1340 (1970 ed., Supp. IV). The Act was passed in 1971 to protect unbranded and unclaimed horses and burros on public lands of the United States from capture, branding, harassment, or death. *Kleppe*, 426 U.S. at 531.

arguing that under the property clause Congress possessed only a narrow power to control animals that were damaging the public lands, and that otherwise the state retained legislative jurisdiction over wildlife on the public lands.<sup>177</sup>

In rejecting the state's narrow reading of the property clause the *Kleppe* Court provided a contemporary validation of several strands of property clause doctrine. Reducing the constitutional issue to whether the Act was a "needful" regulation "respecting" the public lands,<sup>178</sup> the Court answered that under the property clause this was a determination entrusted to Congress.<sup>179</sup> Moreover, the Court noted that in legislating for the public lands "Congress exercises the power both of a proprietor and of a legislature over the public domain."<sup>180</sup> And when Congress exercised this power under the property clause, "the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."<sup>181</sup> The *Kleppe* opinion thus consolidated and affirmed several of the major strands of property clause doctrine that had developed over the course of one hundred and fifty years.<sup>182</sup>

#### D. *The Appropriate Standard of Judicial Review for Property Clause Legislation*

Two interrelated issues underlie the concept of judicial review of congressional acts. The first issue involves the determination of who shall pass judgment on the constitutionality of legislation. Since the early case of *Marbury v. Madison*,<sup>183</sup> a precept of American jurisprudence has been the assumption that the Supreme Court possesses the power to declare certain acts of other branches of the national government to be outside the bounds of the Constitution.<sup>184</sup> Conversely, the second issue involves a corollary of that fundamental power, whereby the Court accords deference to those

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177. *Kleppe*, 426 U.S. at 533. New Mexico claimed jurisdiction over the wild horses and burros on the public lands within its borders under the New Mexico Estray Law, N.M. STAT. ANN. § 47-14-1 (1966). *Id.* at 532.

178. *Id.* at 536.

179. *Id.* at 539, citing *United States v. San Francisco*, 310 U.S. at 29-30; *Light v. United States*, 220 U.S. at 537 and *United States v. Gratiot*, 39 U.S. (14 Pet.) at 537-38.

180. *Kleppe*, 426 U.S. at 540, citing *Ala. v. Tex.*, 347 U.S. at 273; *Sinclair v. United States*, 279 U.S. at 297; and *United States v. Midwest Oil Co.*, 236 U.S. at 474.

181. *Kleppe*, 426 U.S. at 543, citing U.S. CONST. art. VI, cl. 2; *Hunt v. United States*, 278 U.S. 96, 100 (1928); and *McKelvey v. United States*, 260 U.S. at 359.

182. Not all commentators agree with this conclusion. Cf. Engdahl, *supra* note 104, at 549-58.

183. 5 U.S. (1 Cranch) 137 (1803).

184. In *Marbury* the Supreme Court for the first time voided an act of Congress on the basis that it was inconsistent with the Constitution, stating that "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void." *Id.* at 177.

acts of the coordinate branches that derive from their constitutionally assigned powers.<sup>185</sup> The Supreme Court set forth this maxim as follows in the early case of *McCulloch v. Maryland*:<sup>186</sup>

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>187</sup>

While the first issue is outside the scope of this article,<sup>188</sup> a consideration of the second issue is germane to a discussion of the appropriate standard of judicial review to be used by the Court in passing on the constitutionality of property clause legislation.

In sustaining a broad preemptive power of Congress under the property clause, the Supreme Court in *Kleppe* applied a deferential standard of judicial review: "[W]e must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress."<sup>189</sup> While the Supreme Court in the post-*Lochner* era has as a general rule shown deference to congressional enactments,<sup>190</sup> the standard as applied to

185. This principle also derives from *Marbury, id.* at 165-66. For a comprehensive treatment of both issues see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

186. 17 U.S. (4 Wheat.) 316 (1819).

187. *Id.* at 421.

188. Some commentators have contended that the text of the Constitution provides no explicit support for the assumption by the Supreme Court of the power of passing on the constitutionality of acts of Congress or the President:

The power which distinguishes the Supreme Court of the United States is that of constitutional review of actions of the other branches of government, federal and state. Curiously enough, this power of judicial review, as it is called, does not derive from any explicit constitutional command. The authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself.

A. BICKEL, THE LEAST DANGEROUS BRANCH 1 (1962). This situation imposes a certain irony on the edicts of the *Berger* Court vis-a-vis the Congress, where the Court has adopted a strict interpretivist point of view in passing on the constitutionality of legislation.

189. 426 U.S. at 536. Citing *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light v. United States*, 220 U.S. 523, 537 (1911); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537-38 (1840).

190. In *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court invalidated a state law aimed at improving the working conditions of bakery workers. The period from 1905 until 1937 is described as the *Lochner* era, and it refers to the Supreme Court's willingness during this time to pass judgment on and invalidate state and federal social and economic legislation as violative of the substantive due process requirements of the Constitution, i.e. the guarantee that legislation have a rational relationship to a legitimate end of government. In the post-*Lochner* era the Court has shown considerably more deference to such legislative enactments. While the "rational relationship" requirement remains, it is now presumed by the Court to exist. The classic statement of this contemporary standard of judicial review was set forth by Justice Stone in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), where he explained that

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced



legislation passed under the property clause derives from different constitutional stock. In light of the Supreme Court's willingness in *Chadha* to overcome the deference generally accorded legislation,<sup>191</sup> it is important to understand the distinctive nature of the deference that the Court has traditionally accorded property clause enactments. As such, the cases cited by the *Kleppe* Court in support of a deferential standard of judicial review for property clause legislation, *United States v. San Francisco*,<sup>192</sup> *Light v. United States*,<sup>193</sup> and *United States v. Gratiot*,<sup>194</sup> are examined below.

It will be recalled that *Gratiot* served as an important counterpoint to other early cases which had sharply limited Congress' power over the public lands in the states.<sup>195</sup> In upholding legislation allowing the President to lease lead mines located on public land within the State of Illinois, the *Gratiot* Court stated that under the property clause the power over those lands "is vested in Congress without limitation."<sup>196</sup> Because such a broad congressional power had formerly been limited to the public lands in the territory of the United States,<sup>197</sup> *Gratiot* stands as a seminal decision in the development of contemporary property clause doctrine. The *Kleppe* Court's reliance on *Gratiot* as authority in support of judicial deference was a significant reaffirmation of the expansive power of Congress under the property clause.

In *San Francisco* the Supreme Court again upheld legislation passed by Congress pursuant to the property clause,<sup>198</sup> relying on *Gratiot* for the

unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Appended to the passage set out above was the now famous "footnote 4," in which Justice Stone held out the possibility of a stricter standard of judicial review of legislation impacting individual rights:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . .

*Id.* at 152 n.4. The Court has subsequently adopted a strict scrutiny standard for such legislation. *See*, NOWAK, ROTUNDA, YOUNG, *supra* note 146, at 443-52. *See also* TRIBE, *supra* note 70, at 434-36.

191. *Chadha*, 103 S. Ct. at 2780-81:

We turn now to the question whether action of one House of Congress under § 244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained . . . .

192. 310 U.S. 16 (1940).

193. 220 U.S. 523 (1911).

194. 39 U.S. (14 Pet.) 526 (1840).

195. *See supra* notes 146-60 and accompanying text.

196. 39 U.S. (14 Pet.) at 537.

197. *See supra* notes 35-45 and accompanying text.

198. The *San Francisco* Court upheld legislation which imposed strict limits on the City of San Francisco in selling electricity produced at a hydroelectric facility located on lands given to the city by the federal government. *San Francisco*, 310 U.S. at 29-30.

principle that "[t]he power over the public land thus entrusted to Congress is without limitations."<sup>199</sup> Quoting *Light*, the *San Francisco* Court then juxtaposed an axiom of this principle: "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."<sup>200</sup>

The relationship between the existence of a trust and a deferential standard of judicial review was more fully developed in *Light*, where the Supreme Court stated:

"All the public lands of the nation are held in trust for the people of the whole country." *United States v. Trinidad Coal Co.*, 137 U.S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes.<sup>201</sup>

The *Kleppe* Court's use of *Light* in support of judicial deference is significant in several respects. Although *Light* was decided at the height of the *Lochner* era, the Supreme Court accorded Congress complete deference as to a legislative act passed under the property clause, despite potentially serious economic impacts on private parties. This illustrates the distinctive nature of such legislation. Additionally, the *Light* Court stated in effect that the deference which the Court accorded to such legislation derived from the fact that under the property clause Congress holds the public lands in trust for the people of the nation.

This trust analogy reinforces the notion of a proprietorial power of Congress under the property clause, as a trust is a "right of property, real or personal, held by one party for the benefit of another."<sup>202</sup> While several commentators have recently developed arguments in favor of extending the public trust doctrine so as to impose responsibilities on administrative agencies and Congress,<sup>203</sup> the Supreme Court cases using trust language vis-a-vis Congress stand in support of a broad congressional power with

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199. *Id.* at 29.

200. *Id.* at 29-30. The *San Francisco* Court had earlier analogized the role of Congress under legislation passed under the property clause to a trustee: "Congress, in effect trustee of public lands for all the people, has by this Act sought to protect and control the disposition of a section of the public domain." *Id.* at 28.

201. 220 U.S. at 537. This is the page of the *Light* opinion cited by the *Kleppe* Court in support of a deferential standard of judicial review. See *Kleppe*, 426 U.S. at 536.

202. Black's Law Dictionary 1352 (5th ed. 1979).

203. See, e.g., Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586, 591 (1977); Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. CAL. DAVIS L. REV. 269 (1980).

attendant judicial deference.<sup>204</sup>

#### IV. AN ARGUMENT IN FAVOR OF THE CONSTITUTIONALITY OF SECTION 204(e) OF FLPMA

The materials examined in the preceding section indicate that the property clause is rich in history and extraordinary in character. At the very least, these materials provide the basis to a legitimate argument in favor of exempting the legislative veto provision contained in section 204(e) of FLPMA from the strictures for legislation set forth in *Chadha*. Any such argument, however, will have to confront the broad<sup>205</sup> and absolutist<sup>206</sup> language of *Chadha*. Thus, whether the argument will ultimately prevail remains a difficult question which will present a court confronting the issue with a genuine "hard case."<sup>207</sup> Without denying the weight of the opposing argument,<sup>208</sup> the reasons for upholding the constitutionality of section 204(e) are outlined below.

In declaring unconstitutional the legislative veto provisions of the INA, the *Chadha* Court placed heavy emphasis on both the text of the Constitution and the framers' intent in crafting "the constitutional design for the separation of powers."<sup>209</sup> Applying this method of analysis to the powers of Congress under the property clause, it appears that the text of the clause itself is clear in assigning to Congress a broad power to make rules and regulations respecting the public lands. This plain reading of the clause is reinforced by the understanding that the clause traces back both to colonial resentment of control of the western territories by the English

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204. For cases discussing the public land trust held by Congress, see *United States v. San Francisco*, 310 U.S. 16, 28 (1940); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1919); *Light v. United States*, 220 U.S. 523, 537 (1911); *Camfield v. United States*, 167 U.S. 518, 524 (1897); *Knight v. United States Land Ass'n*, 142 U.S. 161, 181 (1891); *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890).

205. The *Chadha* Court broadly defined a legislative act as one having "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside of the legislative branch." *Chadha*, 103 S. Ct. at 2784.

206. The *Chadha* Court saw little latitude in the congressional exercise of legislative power: "It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.*

207. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 79-130 (1977). According to Professor Dworkin, hard cases are those in which the Court must choose between competing sets of principles and policies which are both in some sense legitimate. Despite the difficulty of the endeavor, in Dworkin's theory there is a correct decision which is indicated by the result which best "fits" into the overarching scheme of the general principles and policies of the legal system.

208. See, e.g., P. Baldwin, *The Effects of Immigration and Naturalization Service v. Chadha on Certain Provisions in the Federal Land Policy and Management Act*, Cong. Research Serv., Libr. of Cong. (August 19, 1983, rev. September 14, 1983).

209. *Chadha*, 103 S. Ct. at 2781.

Crown,<sup>210</sup> and later to the framers' concern that the new states carved from the territories not come to exert an inordinate political power over the older states.<sup>211</sup> From these concerns emerged the framers' decision to vest in Congress the "Power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>212</sup>

Early Supreme Court decisions recognized the consequence of this political decision: under the property clause Congress was vested with an exceptional power which exempted property clause legislation from the strictures of the separation of powers doctrine which would otherwise operate to limit congressional action.<sup>213</sup> Recently, in resolving the separation of powers issue raised by the creation of the bankruptcy court system, the Supreme Court relied on such early precedent in noting that the property clause was an example of a grant to the legislative branch of a power that "was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers."<sup>214</sup>

Over the course of the last century and a half, the Supreme Court has relied on that "historically and constitutionally" exceptional power of Congress to uphold property clause legislation from a broad array of challenges. Chief among these challenges has been the contention that under the tenth amendment the states should exercise jurisdiction over the public lands within their borders. With the notable exception of the equal footing doctrine, which has itself receded in significance,<sup>215</sup> the Supreme Court has consistently found a broad preemptive power vested in Congress through the property clause.<sup>216</sup> In the contemporary landmark decision of *Kleppe v. New Mexico*,<sup>217</sup> the Supreme Court strongly affirmed the preemptive nature of this power.

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210. See *supra* notes 89-91 and accompanying text.

211. See *supra* notes 107-12 and accompanying text.

212. U.S. CONST. art. IV, § 3, cl. 2.

213. See *supra* notes 116-21 and accompanying text. Recall that in the early cases of *Sare & Lalarde v. Pitot*, 10 U.S. (6 Cranch) 332 (1810), and *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), the Supreme Court upheld the creation by Congress of legislatively controlled court systems in the territories against the charge that such courts violated the requirements for federal courts set forth in article III of the Constitution.

214. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982). The *Northern Pipeline* Court quoted at length from the *American Insurance Co.* decision to illustrate this point. *Id.* at 65.

215. See *supra* notes 133-45 and accompanying text.

216. See *supra* notes 149-61 and accompanying text.

217. 426 U.S. 529 (1976).

The supremacy clause<sup>218</sup> guarantees preemption of state laws by all federal legislation passed pursuant to the Constitution. Therefore, the significance of *Kleppe* and its predecessors lies not in the Court's application of the preemption doctrine *per se*, but in the underlying decision by the Court to reject a narrow reading of the powers of Congress under the property clause, finding instead a power broad enough to support diverse legislation.<sup>219</sup> As the *Kleppe* Court noted, the primary question involved in such preemption analysis is whether the legislation is a "needful" regulation "respecting" the public lands.<sup>220</sup>

Moreover, as established by a long line of Supreme Court opinions, when Congress makes "needful rules and regulations" respecting the public lands, it is not necessarily acting pursuant to its legislative powers as set forth in article I of the Constitution.<sup>221</sup> Rather, "Congress exercises the powers both of a proprietor and a legislature over the public domain."<sup>222</sup> The dual nature of Congress' preemptive power over the public lands carries with it the significant implication that property clause legislation is not strictly bound by the same requirements which are imposed on article I legislation, such as that at issue in *Chadha*.<sup>223</sup>

This distinctive character of the property clause power has also been relied on in upholding both implied delegations of authority to the executive,<sup>224</sup> and broad delegations of rulemaking authority to the States.<sup>225</sup> The proprietorial nature of the property clause power could likewise be used to argue in favor of the delegation of power contained in section 204(e) of FLPMA, which vests decision-making power in two committees of Congress.

Perhaps more significant than any single manifestation of Congress' powers under the property clause, however, is the deferential standard of judicial review which the Court has fashioned in response to the finding

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218. U.S. CONST. art. VI, § 2:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

219. See, e.g., *Camfield v. United States*, 167 U.S. 518 (1896) (upholding extra territorial application of property clause legislation forbidding enclosures of public lands); *Light v. United States*, 220 U.S. 523 (1911) (upholding property clause legislation regulating grazing on the public lands); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (upholding property clause legislation protecting wild burros and horses).

220. 426 U.S. at 536, 539.

221. See *supra* notes 162-68 and accompanying text.

222. *Kleppe*, 426 U.S. at 540.

223. *Chadha*, 103 S. Ct. at 2778-79.

224. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

225. *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905).

that "determinations under the Property Clause are entrusted primarily to the judgment of Congress."<sup>226</sup> Deriving a trust analogy from this basis,<sup>227</sup> the Court has on numerous occasions declared that as trustee of the public lands, the power of Congress is "without limitation."<sup>228</sup> While such an absolute claim to power would undoubtedly recede in some circumstances,<sup>229</sup> it nevertheless serves to bolster the strong attitude of judicial deference accorded property clause legislation.

Further, given this deferential underpinning, a strong argument can be advanced in favor of the application of the political question doctrine<sup>230</sup> to the controversy between the executive branch and the legislative branch over the constitutionality of section 204(e) of FLPMA. Although the *Chadha* Court refused to apply the political question doctrine in its consideration of the constitutionality of the legislative veto provision of the INA,<sup>231</sup> there is a substantial distinction between that provision and the legislative veto provision contained in section 204(e) of FLPMA. As discussed previously, the judicial deference accorded property clause legislation derives from different constitutional stock than the deference generally accorded legislation passed pursuant to Congress' article I powers.<sup>232</sup>

In the leading contemporary formulation of the political question doctrine set forth in *Baker v. Carr*,<sup>233</sup> the Supreme Court stated that the doctrine was "essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department. . . ."<sup>234</sup> As set forth above, the property clause would meet the criteria in the case of resolving the constitutionality of section 204(e) of FLPMA. As such, the Court's determination to invoke the political question doctrine would not only be consistent with the strong tradition of judicial deference generally accorded property clause legisla-

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226. *Kleppe*, 426 U.S. at 536, citing *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light v. United States*, 220 U.S. 523, 537 (1911); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537-538 (1840).

227. See *supra* notes 199-204 and accompanying text.

228. See *supra* notes 196-200 and accompanying text.

229. For instance, a court might legitimately feel compelled to apply stricter judicial scrutiny to property clause legislation which in some manner infringed on a fundamental right. See *supra* note 190.

230. According to the political question doctrine certain issues are essentially political in nature and best resolved by the "body politic" rather than the judiciary. See NOWAK, ROTUNDA, YOUNG, *supra* note 147, at 109.

231. *Chadha*, 103 S. Ct. at 2779.

232. See *supra* notes 190-200 and accompanying text.

233. 369 U.S. 186 (1962).

234. *Id.* at 217.

tion in other contexts, but it would also reflect the Court's respect for Congress' ability to craft politically balanced responses in its exercise of the unique powers inherent in the property clause.<sup>235</sup>

## V. CONCLUSION

This article has examined a public land law issue of first impression: whether the legislative veto provision contained in section 204(e) of FLPMA is exempt from the strictures for legislation set forth by the Supreme Court in *Chadha*. The issue presents a "hard case," with no easy answer. But by examining the rich historical underpinnings of the property clause, and by tracing the Supreme Court's construction of the property clause power in a number of contexts, this article has discerned that a viable argument exists in support of the provision.

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235. According to Professor Tribe, in making the determination of whether to invoke the political question doctrine:

[A] court must first of all construe the relevant constitutional text, and seek to identify the purposes the particular provision serves within the constitutional scheme as a whole. At this stage of the analysis, the court would find particularly relevant the fact that the constitutional provision by its terms grants authority to another branch of government; if the provision recognizes such authority, the court will have to consider the possibility of conflicting conclusions, and the actual necessity for parallel judicial and political remedies. But ultimately, the political question inquiry turns as much on the court's conception of judicial competence as on the constitutional text.

TRIBE, *supra* note 70, at 79.